

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JERRY GARDNER,

3:13-cv-01344-MA

Plaintiff,

ORDER

v.

COMMISSIONER SOCIAL SECURITY  
ADMINISTRATION,

Defendant.

MARSH, Judge

Defendant moves to dismiss this action to review a final decision of the Commissioner of Social Security denying in part Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) benefits because Plaintiff's complaint was untimely filed in this Court. Plaintiff does not oppose Defendant's Motion.

A plaintiff must commence a civil action reviewing the denial of an application for DIB or SSI within 60 days after receiving the notice of such decision. 42 U.S.C. § 405(g). A claimant is presumed to have received notice of a decision within five days after the notice was mailed. 20 C.F.R. §§ 404.901, 416.1401.


Thus, a plaintiff effectively has 65 days after the date of the notice to commence a civil action reviewing the Commissioner's decision absent a showing that the plaintiff received notice outside the presumptive five-day period.

The Appeals Council issued its order denying review of the Administrative Law Judge's decision on May 29, 2013. Plaintiff was required to file his complaint by Friday, August 2, 2013 - the 65<sup>th</sup> day after the Appeals Council denied review. Plaintiff filed his complaint on Monday, August 5, 2013. Complaint to Review Final Decision of Commissioner (#1). Plaintiff's Complaint contains no allegations by which Plaintiff could establish equitable estoppel. Therefore, this action must be dismissed. See Fed. R. Civ. P. 12(b)(6).

Defendant's Unopposed Motion to Dismiss for Failure to State a Claim (10) is GRANTED. This action is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 13 day of February, 2014.

  
Malcolm F. Marsh  
United States District Judge